United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2529

United States Court of Appeals

FOR THE SECOND CIRCUIT

B P/s

JAMES L. McCARTHY, HUBERTA McCARTHY, PETER F. FAY and SHARON L. FAY,

Plaintiffs,

SHARON L. and PETER F. FAY,

Plaintiffs-Appellants,

vs.

EAST AFRICAN AIRWAYS CORPORATION, BRITISH AIRCRAFT CORPORATION, LTD., BRITISH AIRCRAFT CORPORATION (COMMERCIAL AIRCRAFT), LTD., BRITISH AIRCRAFT CORPORATION (OPERATING), LTD., BRITISH AIRCRAFT CORPORATION (U.S.A.), INC., DUNLOP LIMITED, DUNLOP HOLDINGS, LTD., DUNLOP CO. OF GREAT BRITAIN and BRITISH OVERSEAS AIRWAYS CORPORATION, now known as BRITISH AIRWAYS,

Defendants,

EAST AFRICAN AIRWAYS CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE

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Docket No. 74-2529

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Preliminary Statement

The case is here on appeal from a final judgment entered on an order dismissing the action of plaintiffs Peter and Sharon Fay as against East African Airways Cor-

poration* for lack of treaty jurisdiction under Article 28(1) of the Warsaw Convention. (A. 73a).

I

Counter Statement of the Issues Presented for Review

Contrary to plaintiffs' statement of the issues presented, the case involves the following issues:

1. Whether the District Court erred in dismissing the action of plaintiffs Peter and Sharon Fay against defendant East African for lack of subject matter jurisdiction under Article 28(1) of the Warsaw Convention as interpreted and applied by this Court in *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F. 2d 798 (2d Cir. 1971)?

2. Whether the District Court erroneously concluded that the "destination" of plaintiffs' transportation within the meaning of Article 28(1) of the Warsaw Convention was London, as specified in their passenger tickets?

3. Whether Article 28 of the Warsaw Convention is an unconstitutional infringement on the subject matter jurisdiction of United States District Courts?

II

Statement of the Case

1. *The Relevant Facts.*

This is a personal injury action brought by plaintiffs Peter and Sharon Fay and James L. McCarthy for damages allegedly sustained by them as the result of an air-

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* Hereinafter referred to as East African

craft accident in Addis Ababa, Ethiopia on April 18, 1972. (A. 4a-5a, 12a-13a, 16a-17a). Plaintiff Huberta McCarthy seeks to recover damages for loss of services, consortium, etc. of her husband, James McCarthy. (A. 6a).

In addition to East African, the Complaint names as defendants British Aircraft Corporation, Ltd., British Aircraft Corporation (Commercial Aircraft), Ltd., British Aircraft Corporation (Operating), Ltd., British Aircraft Corporation (U.S.A.), Inc., (hereinafter referred to collectively as "British Aircraft Corporation"), British Overseas Airways Corporation (hereinafter referred to as "BOAC") and Dunlop Limited, Dunlop Holdings, Ltd. and Dunlop Co. of Great Britain (hereinafter referred to collectively as "Dunlop"). (A. 2a-3a).

The Complaint alleges jurisdiction in the District Court upon the sole basis of diversity of citizenship and requisite amount in controversy pursuant to 28 U.S.C. §1332. (A. 2a-3a).

The aircraft on which the Fay plaintiffs were travelling at the time of the subject accident was operated by East African and was on a regularly scheduled flight originating in Nairobi, Kenya, and destined for London, England via Addis Ababa, Ethiopia and Rome, Italy. (A. 4a, 22a).

The Fay plaintiffs were travelling on passenger tickets purchased in Nairobi, Kenya and which specified as the destination for their transportation, London, England. (A. 44a-47a). East African is a corporation existing under the laws of the East African Community, consisting of the United Republic of Tanzania, the Republic of Uganda and the Republic of Kenya, with its headquarters and principal place of business in Nairobi, Kenya. (A. 2a-3a, 41a).

In March of 1972, in response to an advertisement in a local paper for charter flights to New York and London,

the Fay plaintiffs contacted E. A. Sun, Sea & Safari, a travel agency in Nairobi, Kenya to arrange transportation for the Fay plaintiffs to New York. (A. 53a). They were advised by an employee of E. A. Sun, Sea & Safari that they should purchase a ticket only to London and when in London purchase a ticket for the flight from London to New York from the E. A. Sun, Sea & Safari office in London. (A. 53a-54a). According to the Fay plaintiffs, the reason given was that the charter flight from Nairobi to London could be delayed and the Fay plaintiffs would lose their money if they did not make a connecting flight in London. (A. 53a). "Having flown charter status before, this arrangement did not seem out of the ordinary to" the Fay plaintiffs. (A. 54a).

Subsequently, E. A. Sun, Sea & Safari advised the Fay plaintiffs in Nairobi that they would be booked and travel on a flight operated by East African from Nairobi to London; again, they were advised that they should pay for the London/New York journey at the E. A. Sun, Sea & Safari office in London. (A. 54a). E. A. Sun, Sea & Safari thereafter delivered to the Fay plaintiffs passenger tickets for transportation on East African Flight 720 of April 18, 1972. (A. 54a, 47a). E. A. Sun, Sea & Safari had purchased the tickets for the Fay plaintiffs from East African in Nairobi and paid to East African the required air fare for the trip from Nairobi to London. (A. 45a-47a).

At no time did the Fay plaintiffs deal with East African in arranging their transportation; all arrangements for the Fay plaintiffs were handled for them by E. A. Sun, Sea & Safari. (A. 54a).

Contrary to the factually unsupported allegation by the Fay plaintiffs and their counsel, E. A. Sun, Sea & Safari is not and was not at any time an agent of East African

in respect of the Fay plaintiffs' transportation arrangements. (A. 41a-43a). E. A. Sun, Sea & Safari purchased the tickets for its clients, the Fay plaintiffs, in the same manner as any other person or organization would purchase tickets from East African. (A. 45a-47a, 53a-54a).

The destination specified in the passenger tickets purchased on behalf of the Fay plaintiffs and used by them on the flight in question specified the place of destination as London. (A. 44a, 47a).

East African does not operate any flights to the United States and the flight on which the Fay plaintiffs were travelling at the time of the subject accident was to terminate in London, England. (A. 41a, 46a).

2. *The Proceedings Below.*

East African moved in the District Court, pursuant to Rules 12(b)(1) and 12(h)(3) of the Federal Rules of Civil Procedure, for an order dismissing the Complaint of the Fay plaintiffs as to East African on the ground that the Court lacks subject matter jurisdiction of their Complaint against East African by virtue of Article 28(1) of the Warsaw Convention.* (A. 36a-70a).

The Court below granted East African's motion to dismiss for lack of treaty jurisdiction, relying upon and following this Court's decision in *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F. 2d 798 (2d Cir. 1971). (A. 73a). The Court below, by order dated April 17, 1975, directed the entry of final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. (Supp. A, III a). Final judgment dismissing the complaint of the Fay plaintiffs was

* Official title—Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000 (1934), T.S. No. 876.

thereafter entered on April 29, 1975 and this appeal by the Fay plaintiffs followed.

No motion was filed to dismiss the Complaint of the McCarthy plaintiffs as treaty jurisdiction with respect to their claims properly lies in the United States under Article 28(1) of the Warsaw Convention.

Summary of Argument

The action of the Fay plaintiffs against East African is governed by the provisions of the Warsaw Convention.

Article 28(1) of the Warsaw Convention provides that an action for damages must be brought in one of four places enumerated therein. Plaintiffs concede that three of these places are not in the United States, namely the place where the tickets were issued, the domicile and the principal place of business of the carrier, East African. Each of these places, under the undisputed facts in this case, is Nairobi, Kenya.

The fourth place specified in Article 28 is the place of destination. This is determined by reference to the passenger ticket and it is undisputed that the passenger tickets of the Fay plaintiffs specified London as the place of destination. The Fay plaintiffs argue, notwithstanding the fact that their passenger tickets specified London as the place of destination, that New York should be considered their place of destination since it was their intention ultimately to proceed to New York from London, although they had purchased no ticket from East African beyond London before leaving Nairobi. The undisclosed intention of the Fay plaintiffs as to their destination is irrelevant to a determination of the place of destination within the meaning of Article 28 of the Warsaw Convention. The facts are

undisputed that the travel agency consulted by the Fay plaintiffs, E. A. Sun, Sea & Safari, acted at all times on behalf of their clients, the Fay plaintiffs, and E. A. Sun, Sea & Safari was not an agent of East African. Therefore, the fact that the Fay plaintiffs disclosed to their agent, E. A. Sun, Sea & Safari, that they intended ultimately to travel to New York cannot serve to alter the terms of the contract of transportation entered into between the Fay plaintiffs and East African.

Since the requisite treaty jurisdiction in the United States is lacking with respect to the action of the Fay plaintiffs, domestic jurisdictional questions such as ancillary or pendent jurisdiction do not arise. In any event, the subject action does not present a proper basis for the exercise of ancillary or pendent jurisdiction.

Article 28 of the Warsaw Convention is not an unconstitutional infringement on the subject matter jurisdiction of the United States District Courts. The Courts have consistently recognized that Article 28 of the Warsaw Convention properly limits the jurisdiction of the United States District Courts to hear cases to which the provisions of the Warsaw Convention apply. It is not uncommon for the jurisdiction of the United States courts to be restricted or limited by treaty or international agreement.

POINT I

The District Court was correct in dismissing the action of the Fay plaintiffs for lack of treaty jurisdiction under Article 28(1) of the Warsaw Convention as interpreted and applied by this Court in *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971).

1. Article 28(1) of the Warsaw Convention restricts the jurisdictions in which an action for damages governed by the Warsaw Convention can be brought.

Article 28(1) of the Warsaw Convention provides as follows:

> "An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination." 49 Stat. 3020.

The terms of Article 28(1) are clear. In a Warsaw Convention case, a plaintiff must bring his action for damages in the territory of one of the High Contracting Parties and, at the option of the plaintiff, at one of the following places:

(a) "the domicile of the carrier";

(b) the carrier's "principal place of business";

(c) the carrier's "place of business through which the contract has been made"; or

(d) "the place of destination". 49 Stat. 3020.

The exclusivity and the mandatory character of Article 28 is reinforced by Article 32 of the Convention which prohibits any alteration of the jurisdictional requirements imposed by Article 28. Article 32 of the Warsaw Convention provides:

> "Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. . . ." 49 Stat. 3021.

In *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971), the Court held that where none of the places specified in Article 28(1) of the Warsaw Convention is in the United States, the courts of the United States lack subject matter jurisdiction of an action for damages subject to the provisions of the Warsaw Convention. The Court further held that considerations of diversity jurisdiction and federal question jurisdiction do not arise until the treaty jurisdiction requirements of Article 28(1) have first been satisfied. There, plaintiff had purchased a ticket in Vancouver, Canada for a flight on Canadian Pacific Airways from Vancouver, Canada to Tokyo, Japan. Action was commenced by the plaintiff against Canadian Pacific Airways in the Southern District of New York for injuries allegedly suffered during the flight from Vancouver, Canada, to Tokyo, Japan. The District Court denied Canadian Pacific Airways' motion to dismiss the complaint for lack of subject matter jurisdiction under Article 28(1) of the Warsaw Convention, holding that the restrictions of Article 28(1) relate to venue only and that venue was properly established be-

cause Canadian Pacific Airways had a place of business within the jurisdiction of the Court.

This Court *reversed,* holding:

> "We agree, however, that Article 28(1) '. . . must be considered as absolute and mandatory, on the national level, in the jurisdictional sense, and be given [its] proper status as a treaty obligation of our nation without equivocation.' The Warsaw Convention, by virtue of its status as a treaty made under the authority of the United States, is the supreme law of the land, equal in stature and force to the domestic laws of the United States. U.S. Const. art. VI." 452 F. 2d at 801.

Finding that (1) the domicile and principal place of business of Canadian Pacific Airways were in Canada, (2) plaintiff purchased his ticket in Canada and (3) the place of destination listed on plaintiff's ticket was Japan, the Court in *Smith* concluded that the complaint must be dismissed for lack of treaty jurisdiction since none of the places specified in Article 28(1) was in the United States:

> "We therefore look to the Convention to determine its applicability here. Only if it does apply so as to permit of treaty jurisdiction need we answer domestic jurisdiction and venue questions. If treaty jurisdiction under the Convention does not lie, federal jurisdiction under 28 U.S.C. § 1331(a), which permits cases *arising under* United States treaties, clearly cannot be established. Similarly, if the Convention precludes suit, our inquiry ceases without an examination of diversity jurisdiction under 28 U.S.C. § 1332(a)(2); in other words, treaty provisions, being of equal constitutional status, may operate under article VI of the

> Federal Constitution as limitations on diversity jurisdiction, just as the requirements of jurisdictional amount may so operate.
>
> It is evident that this case does not fall within any of the categories of Article 28(1) and that the complaint must therefore be dismissed for lack of treaty jurisdiction." 452 F.2d at 802.

See also, *Eck* v. *United Arab Airlines, Inc.*, 360 F.2d 804 (2d Cir. 1966); *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

It is no longer open to question that Article 28 of the Warsaw Convention relates to subject matter jurisdiction and that there is no subject matter jurisdiction in the United States courts where the United States is not one of the four places enumerated in Article 28. *Smith* v. *Candian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971). See, McKenry, *Judicial Jurisdiction Under the Warsaw Convention*, 29 J. Air L. & Com. 205 (1963).

2. None of the places specified in Article 28(1) is in the United States with respect to the action of the Fay plaintiffs.

Article 28 of the Warsaw Convention requires that an action for damages be brought in the territory of a High Contracting Party and at one of ony four places:

1. the domicile of the carrier;

2. the principal place of business of the carrier;

3. the carrier's place of business where the contract of carriage was made, *i.e.*, where the passenger ticket was issued; or

4. the place of destination.

It has been held that where none of these places is in the United States, the courts in the United States do not have jurisdiction to hear the case. *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971).

The domicile of the carrier within the meaning of Article 28(1) is the carrier's place of incorporation. *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 802 (2d Cir. 1971); *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851, 854-855 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965). It is undisputed that within the meaning of Article 28(1), the East African Community is the place of domicile of the carrier, East African. (A. 2a, 3a, 41a).

For purposes of Article 28(1), foreign corporations such as East African "can have but one principal place of business." *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 802 n. 13 (2d Cir. 1971); *Eck* v. *United Arab Airlines, Inc.*, 360 F.2d 804, 809 n. 9 (2d Cir. 1966); *Nudo* v. *Societe Anonyme Belge D'Exploitation de la Navigation Aerienne (SABENA)*, 207 F.Supp. 191 (E.D. Pa. 1962). It is also undisputed that Nairobi, Kenya is the principal place of business of the carrier, East African. (A. 41a, 49a).

In the transportation of passengers, the contract of carriage is the passenger ticket and for purposes of Article 28(1) the carrier's "place of business through which the contract has been made" is the place where the passenger ticket was purchased. *Smith* v. *Candian Pacific Airways, Ltd.*, 452 F.2d 798, 803 (2d Cir. 1971); *Eck* v. *United Arab Airlines, Inc.*, 360 F.2d 804, 814-815 (2d Cir. 1966). In this case, Nairobi, Kenya is the place of business through which the contract was made. (A. 53a, 54a).

As the Court below noted,

> "Only as to 'place of destination' is there any dispute between the parties; the other three forums are conceded not to be in the United States." (A. 71a).

3. The Court below correctly concluded that the place of destination of the Fay plaintiffs within the meaning of Article 28(1) of the Warsaw Convention was London.

The "place of destination" within the meaning of Article 28(1) is determined by reference to the passenger ticket and is the place stated in the passenger ticket as the ultimate destination of the transportation. *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 802 (2d Cir. 1971); *Grey* v. *American Airlines, Inc.*, 95 F. Supp. 756, 757 (S.D.N.Y. 1950), *aff'd*, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956); *Parkinson* v. *Canadian Pacific Airlines, Ltd.*, 10 Av. Cas. 17,967 (S.D. N.Y. 1968); McKenry, *Judicial Jurisdiction Under the Warsaw Convention*, 29 J. Air L. & Com. 205 (1963).

The destination specified in the passenger tickets purchased on behalf of the Fay plaintiffs and used by them on the flight in question specified the place of destination as London. (A. 44a, 47a).

The Fay plaintiffs contend that they intended New York as the place of destination of their journey. However, as previously demonstrated, the passenger tickets of the Fay plaintiffs specify London as the place of destination. (A. 44a, 47a). The undisclosed intention of the Fay plaintiffs to go to New York cannot alter the terms of the contract of carriage which the Fay plaintiffs freely accepted and which provided for London as the place of destination. *Galli* v. *Re-Al Brazilian International Airlines*, 29 Misc. 2d 499 (Sup. Ct. Queens Co. 1961). See also, *Bowen* v. *Port of New York Authority*, 8 Av. Cas. 18,043 (Sup. Ct. Queens Co. 1964).

As one leading commentator in the field of aviation law has stated:

> "'The place of destination' is that stated in the ticket and is not subject to oral contradiction by the plain-

tiff." 1 L. KREINDLER, AVIATION ACCIDENT LAW §11.06 at 11-44 (1971).

The Fay plaintiffs further argue that their "intended destination" was made known by them to E. A. Sun, Sea & Safari, who, it is claimed, was acting as an agent for East African. Brief for Appellants, p. 8. However, the undisputed facts in the record demonstrate that the Fay plaintiffs contacted E. A. Sun, Sea & Safari to make their travel arrangements (A. 53a), that E. A. Sun, Sea & Safari purchased the tickets for the Fay plaintiffs from East African in Nairobi and paid to East African the required air fare for the trip from Nairobi to London in the same manner as any other person or organization would purchase tickets from East African (A. 45a-47a, 53a, 54a), and that E. A. Sun, Sea & Safari is not and was not at any time an agent of East African in respect of the Fay plaintiffs' transportation arrangements. (A. 41a-43a). The only conclusion that can possibly be drawn from all of these undisputed facts is that E. A. Sun, Sea & Safari acted as an agent for the Fay plaintiffs, not East African. As the District Court stated in dismissing plaintiffs' contention that E. A. Sun, Sea & Safari was acting as agent for East African in the sale of the tickets to the Fay plaintiffs:

> "In any event, the Court need not concern itself with who was acting as agent for whom. The fact is that E. A. Sun, Sea and Safari in Kenya was unable to sell plaintiffs a ticket to New York and could only provide them with passage to London. Although plaintiffs intended to continue their journey on to New York from London, this fact was not evidenced in the contract of carriage in which London is specified as the place of destination. Thus, further consideration by this Court is precluded." (A. 72a).

Accordingly, the Court below correctly determined that the destination of the Fay plaintiffs was London, the place of destination shown on their passenger tickets. (A. 44a, 47a).

4. The lack of proper treaty jurisdiction under Article 28(1) of the Warsaw Convention cannot be cured by reference to domestic considerations such as pendent and ancillary jurisdiction.

Questions of pendent or ancillary jurisdiction are questions of domestic jurisdiction which "cannot be considered unless the prerequisite of international or treaty jurisdiction" under Article 28 of the Warsaw Convention "is first satisfied" with respect to each individual claim. (A. 72a).

In *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971), it was held that questions of domestic jurisdiction do not arise and need not be answered unless the treaty jurisdiction requirements of Article 28 of the Warsaw Convention are first satisfied:

> "We therefore look to the Convention to determine its applicability here. Only if it does apply so as to permit of treaty jurisdiction need we answer domestic jurisdiction and venue questions. If treaty jurisdiction under the Convention does not lie, federal jurisdiction under 28 U.S.C. § 1331(a), which permits cases *arising under* United States treaties, clearly cannot be established. Similarly, if the Convention precludes suit, our inquiry ceases without an examination of diversity jurisdiction under 28 U.S.C. § 1332(a) (2); in other words, treaty provisions, being of equal constitutional status, may operate under article VI of the Federal Constitution as limitations on diversity jurisdiction, just as the requirements of jurisdictional amount may so operate." 452 F.2d at 802.

The prerequisite to consideration of domestic jurisdictional law questions is international or treaty jurisdiction. *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971); *Fabiano Shoe Co., Inc.* v. *Alitalia Airlines*, 380 F.Supp. 1400 (D. Mass. 1974). Whether or not a court could exercise pendent or ancillary jurisdiction over the Fay plaintiffs' claims against East African is a domestic jurisdictional issue: the question is a matter of judicial apportionment of claims in our Federal system between two parallel court systems that might exercise jurisdiction. Article 28(1) of the Warsaw Convention operates similarly, but on the international level. Article 28 mandates where a claim involving international transportation "must be brought." If a nation ("High Contracting Party") is not one of the four enumerated places where an action for damages must be brought, then the courts of that nation have no jurisdiction to consider the claim and, *a fortiori*, do not reach domestic jurisdictional issues such as pendent or ancillary jurisdiction. If the Convention precludes suit, then no further examination of jurisdiction is required. *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971). Thus, the District Court properly held that the question of pendent or ancillary jurisdiction over the Fay plaintiffs' claims against East African did not arise since the prerequisite of treaty jurisdiction was not satisfied.

POINT II

Article 28 of the Warsaw Convention is not an unconstitutional infringement on the subject matter jurisdiction of United States District Courts.

The District Courts of the United States are not constitutional courts. They possess only such jurisdiction as is conferred upon them by Congress pursuant to the power granted Congress by Article III of the Constitution. The Supreme Court is the only court created by the Constitution. WRIGHT, LAW OF FEDERAL COURTS §§ 4, 10 (1970).

The power of Congress to define the jurisdictional limits of the United States District Courts has been stated as follows:

> "It is well settled that the United States district courts have only such jurisdiction as is vested in them by Congress pursuant to the power granted by Article III of the Constitution. In the early case of Cary v. Curtis, 44 U.S. 236, the Supreme Court stated the rule as follows: '* * * the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the Government, and to give to the former powers limited by its own discretion . . .' " 1958 U.S. CODE CONG. & ADM. NEWS, pp. 3103-3104 (1958).

Congress has defined with particularity the general jurisdiction of the United States District Courts. See, 28 U.S.C. §§ 1331-1363.

The Courts have consistently recognized that Article 28 of the Warsaw Convention properly limits the jurisdiction of the United States District Courts to hear cases to which the provisions of the Warsaw Convention apply. The provisions of Article 28 of the Warsaw Convention,

> "being of equal constitutional status, may operate under article VI of the Federal Constitution as limitations on diversity jurisdiction, just as the requirements of jurisdictional amount may so operate." *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 802 (2d Cir. 1971).

See also, *Eck* v. *United Arab Airlines, Inc.*, 360 F.2d 804 (2d Cir. 1966); *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851 (2nd Cir.), *cert. denied*, 382 U.S. 816 (1965); *Biggs* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 10 Av. Cas. 18,354 (E.D.N.Y. 1969); *Krug* v. *British European Airways*, 73 Civ. 1333 (S.D.N.Y., September 10, 1973); McKenry, *Judicial Jurisdiction Under the Warsaw Convention*, 29 J. Air L. & Com. 205 (1963).

As a treaty of the United States, the Warsaw Convention and all of its provisions are the supreme law of the land, U.S. Const. art. VI cl.2; *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971); *Husserl* v. *Swiss Air Transport Co.*, 351 F.Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973); *Block* v. *Compagnie Nationale Air France*, 229 F. Supp. 801 (N.D. Ga. 1964), *aff'd*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); *Nudo* v. *Societe Anonyme Belge D'Exploitation de la Navigation Aerienne (SABENA)*, 207 F. Supp. 191 (E.D. Pa. 1962); *Pierre* v. *Eastern Air Lines, Inc.*, 152 F. Supp. 486 (D.N.J. 1957).

As was stated by this Court in the *Smith* case, *supra:*

> "The Warsaw Convention, by virtue of its status as a treaty made under the authority of the United States, is the supreme law of the land, equal in stature and force to the domestic laws of the United States." 452 F.2d at 801.

It is not uncommon for the jurisdiction of the United States courts to be restricted or limited by treaty or international agreement. For example, in *Hannevig* v. *United States,* 84 F. Supp. 743 (U.S. Ct. Cl. 1949), a Norwegian citizen's action was barred by the provisions of a treaty which provided that the sole method of handling the claim was to be by agreement between the Governments of Norway and the United States unless the parties realized an agreement would not be forthcoming. In dismissing the action, the Court concluded:

> "In our opinion this convention or treaty, upon ratification by the Senate, had the effect of withdrawing the claim made in plaintiff's petition from the jurisdiction of this court as effectually as if this had been accomplished by a statute enacted by both Houses of Congress and approved by the President. Article VI, Clause 2, of the Constitution provides as follows:
>
> 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; * * *.'
>
> Under this constitutional provision the convention or treaty here involved became a part of the law of the land and we think it must be regarded as the equivalent of an act of Congress." 84 F. Supp. at 744.

In *Gmo. Niehaus & Co.* v. *United States,* 373 F.2d 944 (U.S. Ct. Cl. 1967) the Court recognized that a "treaty, can, of course, limit the court's jurisdiction. . . ." 373 F.2d at 957. It was also recognized in *Shafter* v. *United States,* 273 F. Supp. 152 (S.D.N.Y. 1967), *aff'd,* 400 F.2d 584 (2d Cir. 1968), *cert. denied,* 393 U.S. 1086 (1969), that access to United States courts could be denied by international agreement. There the Court held that it did not have jurisdiction over the claims of German nationals for an accident occurring in Germany because of a NATO status of forces agreement. The Court stated:

> "There is nothing unfair or irrationally discriminatory in recognition by our Government of exclusive jurisdiction in a civilized foreign State over disputes concerning events and people within the territory of that State." 273 F. Supp. at 157.

That access to District Courts is not constitutionally guaranteed is emphasized by the well recognized legal principle that a United States citizen residing abroad cannot maintain an action in the Federal Courts since he is neither a citizen of a State nor a citizen or subject of a foreign state. *Van der Schelling* v. *U.S. News & World Report, Inc.,* 324 F.2d 956 (3d Cir. 1963), *affirming,* 213 F. Supp. 756 (E.D. Pa.), *cert. denied,* 377 U.S. 906 (1964); *Pemberton* v. *Colonna,* 290 F.2d 220 (3d Cir. 1961), *affirming,* 189 F. Supp. 430 (E.D. Pa. 1960); *Clapp* v. *Stearns & Co.,* 229 F. Supp. 305 (S.D.N.Y. 1964); *McClanahan* v. *Galloway,* 127 F. Supp. 929 (N.D. Cal. 1955); *Alla* v. *Kornfeld,* 84 F. Supp. 823 (N.D. Ill. 1949); *Cowell* v. *Ducas,* 2 F. Supp. 1 (S.D.N.Y. 1932).

In affirming a judgment dismissing a complaint for lack of jurisdiction, the Court in *Pemberton* v. *Colonna,* 290 F. 2d 220 (3d Cir. 1961), stated:

> "Assuming that she has established a domicile in Mexico she still is not entitled to maintain an action in federal court. It is admitted she has not become a citizen of Mexico and that she is living there under what is called a 'tourists' card.' A citizen of the United States is a citizen of the state in which he is domiciled. That is clear. But a citizen of the United States who is domiciled abroad is not a citizen of the country where he makes his home. To do that he must renounce his United States citizenship and acquire citizenship in the foreign country. We think that section (a)(2) 'citizens of a State, and foreign states or citizens or subjects thereof * * *' means what it says. The plaintiff even if no longer a citizen of Pennsylvania is a citizen of the United States and not a citizen of Mexico under the admitted facts." 290 F. 2d at 221.

A United States citizen, domiciled abroad, has been held to be neither a citizen of a state nor a subject of his country of residence, and, therefore, cannot invoke either diversity or alienage jurisdiction. *Van der Schelling* v. *U.S. News & World Report, Inc.*, 324 F. 2d 956 (3d Cir. 1963), *affirming*, 213 F. Supp. 756 (E.D. Pa.), *cert. denied*, 377 U.S. 906 (1964).

Access to United States District Courts is not preserved by any provision of the Constitution. The jurisdictional limits of United States District Courts are expressly left by the Constitution to the Congress. It cannot properly be held, therefore, that a duly ratified treaty of the United States, which limits subject matter jurisdiction of United States District Courts with respect to cases to which the treaty applies, violates any provision of the Constitution. Accordingly, Article 28 of the Warsaw Convention, in placing restrictions on the subject matter jurisdiction of

United States District Courts to hear cases to which the Convention applies, is not an unconstitutional infringement on the congressionally established jurisdiction of the United States District Courts.

CONCLUSION

The judgment of the District Court dismissing the action of the Fay plaintiffs for lack of treaty jurisdiction under Article 28(1) of the Warsaw Convention should be affirmed.

Respectfully submitted,

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East African Airways Corporation

GEORGE N. TOMPKINS, JR.
THOMAS J. WHALEN
MICHAEL J. HOLLAND

Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES L. McCARTHY, HUBERTA McCARTHY, PETER F. FAY and HSARON L. FAY,

Plaintiffs,

SHARON L. and PETER F. FAY,

Plaintiffs-Appellants,

vs.

EAST AFRICAN AIRWAYS CORPORATION, BRITISH AIRCRAFT CORPORATION, LTD., BRITISH AIRCRAFT CORPORATION (COMMERCIAL AIRCRAFT), LTD., BRITISH AIRCRAFT CORPORATION (OPERATING., LTD., BRITISH AIRCRAFT CORPORATION (U.S.A.), INC., DUNLOP LIMITED, DUNLOP HOLDINGS, LTD., DUNLOP CO. OF GREAT BRITAIN and BRITISH OVERSEAS AIRWAYS CORPORATION, now known as BRITISH AIRWAYS,

Defendants,

EAST AFRICAN AIRWAYS CORPORATION,

Defendant-Appellee.

Civil Action No. 74-2529

AFFIDAVIT OF PERSONAL SERVICE

A

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Glenn Pogust, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Remsen's Lane, Oyster Bay, New York 11771. That on the 16th day of May, 1975 at 99 Park Avenue, New York, New York 10016 deponent served the within Brief of Defendant-Appellee upon Kreindler & Kreindler the Plaintiffs-Appellants' attorneys herin, by delivering three (3) true copies of them personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Plaintiffs-Appellants' attorneys therein.

Glenn Pogust

Sworn to before me this
16th day of May, 1975

Notary Public

LAWRENCE MENTZ
NOTARY PUBLIC, State of New York
No.31-4513579
Qualified in New York County
Commission Expires March 30, 1977

B

Civil Action No. 74-2529
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
FOR THE SOUTHERN DISTRICT OF NEW YORK

James L. McCarthy, Huberta McCarthy,
Peter F. Fay and Sharon L. Fay,
Plaintiffs,
Sharon L. and Peter F. Fay,
Plaintiffs-Appellants,

vs.

East African Airways Corporation,
British Aircraft Corporation, Ltd.,
British Aircraft Corporation (Operating
Ltd., British Aircraft Corporation (U.S
Inc., Dunlop Limited, Dunlop Holdings,
Dunlop Co. of Great Britain and British
Overseas Airways Corporation, now known
British Airways,
Defendants,
East African Airways Corporation,

Defendant-Appellee,

Brief of Defendant-Appellee

CONDON & FORSYTH

Attorneys for Defendant-Appellee
East African Airways Corporation

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757-6870

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Ltd.,

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